91-281

No. _____

In The

Supreme Court of the United States

October Term, 1991

ROBERT M. WILLINGHAM, JR.,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

PETITION FOR A WRIT OF CERTIORARI

ERNEST DE PASCALE, JR.
FORTSON, BENTLEY & GRIFFIN
P.O. Box 1744
Athens, Georgia 30613
(404) 548-1151

Counsel of Record
for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE AFFIDAVIT USED TO OBTAIN THE FIRST SEARCH WARRANT CONTAINED FALSE INFORMATION AND KNOWING MISREPRESENTATIONS MADE BY THE OFFICERS SWEARING OUT THE WARRANT SO AS TO NOT FALL UNDER THE PURVIEW OF THE *LEON* GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

II. WHETHER EVIDENCE FROM THE SEARCHES FOLLOWING THE INITIAL ILLEGAL SEARCH SHOULD HAVE BEEN EXCLUDED AS FRUITS OF THE POISONOUS TREE IN THAT THEY WERE NOT SUFFICIENTLY UNRELATED WITH THE INITIAL SEARCH SO AS TO DISSIPATE THE TAINT.

III. WHETHER THE TWO INITIAL SEARCHES OF PETITIONER'S HOME WERE GENERAL SEARCHES, AND WHETHER THE SERIES OF FIVE SEARCHES OF THE PETITIONER'S RESIDENCE CONSTITUTED ONE INTERRELATED AND INVASIVE GENERAL SEARCH IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT.

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No. _____

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Petitioner Robert M. Willingham, Jr. respectfully requests that this Court grant his Petition for Writ of Certiorari (the "Writ") seeking review of the opinion of the Court of Appeals of Georgia.

OPINIONS BELOW

The holdings of the trial court are found in Petitioner's Appendix at 1-7. The decision of the Court of Appeals on December 5, 1990, is reported as Willingham v. State, 401 S.E.2d 63, 198 Ga. App. 178 (1990), and is set out in Petitioner's Appendix at 8-17. The order of December 20, 1990, denying rehearing of the Petitioner's appeal is located in Petitioner's Appendix at 18. The order of February 1, 1991, granting certiorari to the Supreme

Court of Georgia is located in Petitioner's Appendix at 19, and the subsequent order of May 10, 1991, of the Supreme Court of Georgia stating that certiorari was improvidently granted is set out in Petitioner's Appendix at 20.

JURISDICTIONAL STATEMENT

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner relies on the Fourth Amendment to the United States Constitution (the "Fourth Amendment") in bringing this Writ. The text reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

STATEMENT OF THE CASE

Petitioner Robert M. Willingham, Jr., requests a Writ of Certiorari to the Court of Appeals of the State of Georgia on the Court of Appeals affirming the trial court's findings.

1. The Facts

The trial court convicted the Petitioner on thirteen counts of theft by conversion based on the fruits of five

separate searches of the Petitioner's residence in Washington, Wilkes County, Georgia.

In 1985, an art dealer, Joseph Rubinfine, received a rare Nathanael Greene letter. Upon contacting an organization familiar with Greene memorabilia, the dealer discovered that the letter belonged to the University of Georgia Library ("Library"). (Transcript, p. 727, l. 2-22) After he returned the letter through the chain of purchase, the Library anonymously received the letter on October 14, 1985, and halted its investigation. (Transcript, p. 713, l. 4-9) The University of Georgia Police Department (U.G.A.P.D.) entered the investigation in July 1986 when the Library informed officers that a map was missing. (Affidavit supporting first search warrant, 12-22-86)

During the course of their investigation of the missing map, officers of the U.G.A.P.D. contacted Graham Arader, an art dealer, who suggested the police should be more interested in an eight volume set of rare books, *The Lilies*. While Arader did not know if the Library owned this work, he cautioned the Library to ascertain whether or not it had a copy of the set. Arader indicated that a Library employee had offered *The Lilies* for sale; in fact, the transaction angered Arader since the purchaser intended to sell for an extremely low price and undercut Arader's prices. After speaking with Arader, the Library determined that its copy of *The Lilies* was missing. (Transcript, p. 1025, l. 1-25; affidavit supporting first warrant, 12-22-86)

The U.G.A.P.D. centered its investigation on the Petitioner, a former employee of the special collections department of the Library, concerning the thefts of the Greene letter and *The Lilies*. (Transcript, p. 1266, l. 17-22) Despite an officer's contention that a "trail of items" was

missing from special collections, later testimony indicates that this department never had a complete inventory of its holdings, making it impossible to ascertain what items were missing. (Transcript, p. 2286, l. 11-23)

Since the Petitioner's residence was not in Clarke County, Officers Jones and Horton of the U.G.A.P.D. secured a first search warrant from a Superior Court judge for Wilkes County. The affidavit failed to identify the Petitioner as a former Library employee, attached a four page list of articles that the library had "discovered missing," and made no attempt to vouch for the art dealer's credibility as an informant. (Mot. to Suppress Hearing, 11-3-87, p. 94, l. 1-6; Transcript, p. 1046, l. 4-24; p. 1047, l. 1-7; Mot. to Suppress Hearing, 11-3-87, p. 96, l. 5-21)

When Jones, Horton, other officers, and a library employee (Brooks) executed this warrant on December 22, 1986, none of the items described in the warrant were found in the Petitioner's residence. (Transcript, p. 1049, l. 16-25) Brooks, however, examined the contents of the house and identified items that she felt there was a "good possibility" of University ownership. (Motion to Suppress Hearing, 11-20-87, p. 150, l. 7-19) Four such items were seized, and Jones took between twenty-four and thirty-six photographs of the interior of the Petitioner's residence. (Transcript, p. 2278, l. 11-24) Because the things seized were not specified in the search warrant and the officers had no probable cause to believe that they were stolen property, the trial court barred the introduction of the items into testimony or evidence. (Order on Motion to Suppress, 7-30-88)

The observations from the first search were the bases for the affidavit for a second search warrant for the Petitioner's home on February 2, 1987. (Transcript, p. 1044, l. 1-8; p. 1267, l. 8-15; p. 1441, l. 7-10) Officer Jones described the role of the first search in seeking the second warrant as follows:

> The purpose of the [first] search warrant was to hopefully locate property belonging to the University of Georgia Library . . . Many maps and prints were seen by investigators but were not taken during the search because it was not known if these items were missing . . . In particular a 1757 DeBrahm's map of Georgia and South Carolina was seen, an Eleazer Early map of the state of Georgia, and an Abbot's print entitled "Chestnut Butterfly" were seen by investigators but were not taken. (Affidavit supporting second search warrant, 2-2-87, prepared by Mitchell Jones)

The second warrant sought the two maps and the butterfly print. Although the officers found the maps in five minutes, the search continued for five hours. (Transcript, p. 1815, l. 14-22) Horton, Jones' commanding officer, ordered Jones to photograph everything in the house whether or not he found the items immediately. (Transcript, p. 2285, l. 14-25; p. 2286, l. 1-7) As a result, Jones took 257 photographs of maps, prints, and pictures hanging on the walls, items on bookshelves, and contents of drawers. (Transcript, p. 1269, l. 9-16; p. 1763, l. 4-20) The judge who issued the warrant was never informed about plans to extensively photograph the Petitioner's home. (Motion to Suppress Hearing, 11-20-87, p. 141, l. 15-19)

Since no complete inventory had been performed in the special collections department of the Library, these photographs were taken so that library personnel could examine the pictures to determine whether or not these

items were missing from the Library. (Transcript, p. 1822, l. 5-18) After library personnel compared these photographs to negatives, microfilm, library cards and personal recollections, a consent search (February 3, 1987) and two additional warranted searches (February 17, 1987 and March 30, 1987) ensued. (Transcript, p. 1274, l. 7-24; p. 1275, l. 14-24; p. 1281, l. 10-23; p. 1282, l. 7-15; p. 1492, l. 22-23; p. 1493, l. 24-25; p. 1494, l. 1-5; p. 1822, l. 5-18.)

2. The proceedings below

The jury convicted the Petitioner on thirteen counts of theft by conversion, and the trial court denied a new trial. The Court of Appeals of Georgia sustained the conviction, stating that "all searches were conducted in full compliance with applicable constitutional and statutory requirements." (Petitioner's Appendix at 8.) That court denied rehearing. The Supreme Court, after granting a writ of certiorari, vacated its grant as improvident on May 10, 1991. (Petitioner's Appendix at 20.)

The Petitioner raised concerns invoking the Fourth Amendment to the United States Constitution throughout the state proceedings.

The Petitioner raised the issue in his Motion to Suppress on October 19, 1987, with the result that only the fruits of the first search were suppressed. The issue was again raised at trial on September 1, 1988, as an objection to State's Exhibit No. 83 of 303 pictures of the Petitioner's home (Transcript, p. 1766, l. 13-25; p. 1768, l. 1-17). The trial court overruled the objection. Additionally, Petitioner objected on Fourth Amendment grounds to the introduction of items obtained during the search at trial on September 1, 1988. The Court overruled his objection. (Transcript, p. 1778, l. 5-15) Petitioner's Motion for

Directed Verdict, also resting on Fourth Amendment grounds, was overruled during the course of the trial on September 7, 1988. (Transcript, p. 2295). During the trial (September 7, 1988), Petitioner made a Motion to Suppress based on Fourth Amendment grounds, but the Court did not grant it. (Transcript, pp. 2299-2300).

The Petitioner continued to raise the Fourth Amendment issue throughout the appeals process. In the Brief for Appellant to the Court of Appeals of Georgia, filed March 26, 1990, the Petitioner argued under the Fourth Amendment, but the Court of Appeals affirmed the trial court. The Motion for Rehearing relied on the Fourth Amendment, but the Court of Appeals denied the motion. Finally, in the Petition for Writ of Certiorari and Brief of Petitioner in Support filed January 9, 1991, the Petitioner again raised the constitutional issues with the Georgia Supreme Court. While this Court originally granted certiorari, it later found that certiorari was improvidently granted.

SUMMARY OF THE ARGUMENT

"The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks v. United States*, 232 U.S. 383, 393 (1914).

This Court has the opportunity to reaffirm the embodiment within the United States Constitution of the right to be free from unreasonable searches and seizures.

The exclusionary rule furthers this freedom by prohibiting introduction into evidence of materials seized during an unlawful search. *Murray v. United States*, 487 U.S. 533 (1988). *See also Weeks v. United States*, 232 U.S. 383 (1914). Although it is not a part of the Fourth Amendment, its deterrent effect exists to ensure that future searches and seizures comply with constitutional mandates. *United States v. Calandra*, 414 U.S. 338 (1974). As such, this Court must vigorously protect the rights of citizens by boldly enforcing the exclusionary rule, and must reexamine the exceptions to this rule that currently sap it of all vitality.

The exclusionary rule does not benefit the individual criminal defendant; rather, it inures solely to the good of society. *United States v. Leon*, 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984). In order to serve the overriding social interest, courts must weigh the detrimental consequences of illegal police action in terms of the cost of applying the exclusionary rule. *Id.* at 911. However, "suppression is appropriate [where] the officers were dishonest or reckless in preparing their affidavit . . . " *Id.* at 926.

In the matter before this Court, officers of the U.G.A.P.D. exhibited the type of behavior specifically excluded from the *Leon* good faith exception in preparing the initial affidavit. They informed the judge that the attached four page list represented an inventory of missing library items, when in fact no inventory had been performed. Additionally, officers failed to identify sources of information and the credibility of their informants in the affidavit supporting the first search. They also omitted the fact that the Petitioner had been employed in the special collections division of the Library, precluding the judge from considering this factor in his probable cause determination. Finally, the information used in the

probable cause determination was fatally stale, making it impossible to support a reasonable belief that the items sought would be located on the premises.

Although not specifically relying upon *Leon*, the trial court properly suppressed evidence garnered from the first search, finding that the officers did not specify the property to be seized and that they had no probable cause to believe that the items seized were stolen property. However, this suppression was insufficient since all subsequent searches flowed directly from the first.

Throughout the trial, witnesses testified that the information from the first search served as the grounds for the second search (Transcript, p. 1044, l. 1-8; p. 1267, l. 8-15; p. 1441, l. 7-10), that information from the second search served as the basis for the consent search (Transcript, p. 1274, l. 7-24; p. 1771, l. 13-25), that regular visits from the first, second, and consent search formed the grounds for the third search (Transcript, p. 1780, l. 17-25), and that further items in the indictment were identified only by comparing photographs from the first and second searches to the library's negatives, library cards, microfilm, and employee's recollections (Transcript, p. 1493, l. 24-25; p. 1494, l. 1-5; p. 1274, l. 7-24). Since all evidence seized may be traced directly to the initial search, all subsequent seizures must be excluded as fruits of the poisonous tree.

As fruits of the poisonous tree, this evidence may be admitted if the connection with the unlawful search is "so attenuated as to dissipate the taint." *Murray v. United States*, 487 U.S. 533, 537 (1988), citing *Nardone v. United States*, 308 U.S. 338 (1939). Given the direct link between the first, illegal search and all subsequent searches, the taint has not been dissipated. Additionally, the State of

Georgia did not and could not prove a sufficiently tenuous connection to support admissibility.

The independent source and inevitable discovery doctrines have arisen as means to prove the requisite attenuation. Evidence acquired from an independent source is untainted evidence identical to that unlawfully acquired. *Murray*, 487 U.S. at 538. An independent source does not exist where a decision to seek a subsequent warrant is prompted solely by the initial illegal search or if information from the illegal search was presented to the judge issuing the warrant and affected his determination. *Id.* at 542. In the matter before this Court, an independent source of information concerning property missing from the Library did not exist: no inventory had been performed, making it impossible to determine the exact contents of the special collections division. Additionally, all subsequent searches were prompted solely by the initial illegal search in that information, photographs, and impressions of a library employee garnered on the first search served as the sole basis for the later searches.

Since tainted evidence would be admissible if discovered through an independent source, the inevitable discovery doctrine provides that evidence which would have been inevitably discovered is admissible. *Nix v. Williams*, 467 U.S. 431 (1984), *cert. denied* 471 U.S. 1138 (1985). A case interpreting *Nix* requires that lawful means be pursued prior to the illegal action in order to rely on the inevitable discovery doctrine. *U.S. v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied* 471 U.S. 1117 (1985). In this case, there were no assurances that the same information would have been inevitably discovered or

that police began the investigation prior to the initial illegality: The inventory process was still incomplete at the time of trial.

Instead of ascertaining exactly what was missing from the Library, officers of the U.G.A.P.D. set out upon a wide-ranging exploratory search that the Framers of the Fourth Amendment intended to prohibit. The purpose of the first search was to "hopefully locate [University] property." The second search became a general search by virtue of the duration, the photographs constituting unreasonable seizures, the lack of protection of the plain view doctrine, and the warrant's lack of particularity. Since these searches led to frequent, interdependent searches, all five searches must be considered as a general search violative of the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

I. POLICE OFFICERS ACTED DISHONESTLY AND RECKLESSLY IN OBTAINING THE FIRST SEARCH WARRANT; THEREFORE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY.

The Court in *United States v. Leon*, 468 U.S. 897, 905, *reh'g denied* 468 U.S. 1250 (1984), formulated an exception to the exclusionary rule for "evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." In recognizing that admission of such evidence was only warranted where law enforcement officials acted in good faith, the Court held that the exclusionary rule still applied in cases where the officers were dishonest or reckless in preparing

the affidavit, could not have had an objectively reasonable belief as to the existence of probable cause, or supported the application with only a "bare bones" affidavit. *Id.* at 926. In these instances, suppression would be appropriate as a deterrent to future police misconduct. *Id.* at 911.

The situation at bar presents an opportunity to deter future misconduct by holding these *Leon* principles applicable to the first search. A clear pronouncement on the *Leon* doctrine is warranted since U.G.A.P.D. officers exhibited the three types of behavior specifically exempted from the good faith exception in drafting the affidavit used to acquire the first warrant.

A. The officers misrepresented material facts and omitted information vital to the determination of probable cause to the issuing judge in obtaining the first warrant.

The *Leon* good faith exception to the exclusionary rule is not applicable to the activities of the officers in obtaining the first search warrant since the officers misrepresented that an inventory of the Library had been done, the officers failed to identify sources of information and credibility of informants, and the officers omitted a fact material to the judge's determination of probable cause.

The officers misrepresented to the issuing judge that the four-page list attached to the affidavit represented an inventory of items missing from the library. In fact, no inventory had been performed in the special collections department, making it impossible to list any items missing. The following testimony indicates that the officer

seeking the warrant knew that the four-page list falsely represented missing items:

> Q. Mr. Horton [the U.G.A.P.D. officer in charge], at the time that you participated in obtaining these search warrants for Mr. Willingham's home you knew that there had not been a complete inventory done of the items that were kept there in special collections in the library, did you not?
>
> A. That is true.
>
> Q. So you knew at that time that they couldn't be certain as to what was missing and what was not missing; isn't that true?
>
> A. That is true.
>
> (Transcript, p. 2286, l. 11-20)

By leading the judge to believe that the Library was missing certain specific items, the officers misled him in his determination of the existence of probable cause.

Additionally, the affidavit supporting the first warrant fails to identify sources of information and fails to support the credibility of sources identified. Officer Jones (the affiant) refers repeatedly to interviews with Library employees and to information given to him by the Library. However, he never identifies the employees interviewed or the persons from whom he received information.

Although Jones identifies several sources, he fails to support their credibility. The informant's credibility is judged by a "totality of the circumstances" approach that balances reliability and basis of knowledge, permitting one to compensate for a deficiency in the other. *Illinois v. Gates*, 462 U.S. 213 (1983). For example, Jones relied on information from Arader, an art dealer. Despite the fact that Arader informed the officer that he kept "poor records," Jones never establishes Arader's reliability and

knowledge. Similarly, Jones made no showing of credibility for Abrams, another art dealer, although the affidavit specifically indicates that Abrams lied to officers during the investigation. (Affidavit supporting first warrant, 12-22-86)

Another misrepresentation occurred when the officers acted dishonestly and recklessly in preparing the initial affidavit, which misled the judge in issuing the first warrant. Whether the Petitioner had access to the special collections department of the Library was essential to the determination of probable cause. Although the Petitioner was a former employee of this department, the search warrant omits this fact. Furthermore, the officer did not specifically inform the judge of the Petitioner's employment. (Mot. to Suppress Hearing, 11-3-87, p. 94, l. 1-6)

B. The officers lacked an objectively reasonable belief as to the existence of probable cause.

Due to the staleness of the information upon which the first affidavit is based, the officers could not have had an objectively reasonable belief as to the existence of probable cause.

When asked why the first search had been performed, an officer of the U.G.A.P.D. replied as follows:

> Well, based on the information we had that Mr. Willingham had sold the Lilies to Dr. Alligood, and that he sold the Nathanael Greene letter, and Mr. Rubinfine had ended up with that. That was [sic.] two of the strong reasons we felt that some of the library property may be in his house. (Transcript, p. 1266, l. 17-22)

This information was insufficient to support a finding of probable cause since these sources were stale.

Investigation into the disappearance of *The Lilies*, a multi-volume set, revealed that it had been missing since early 1984, at least two and one-half years before the series of searches of the Petitioner's home began on December 17, 1986. (Transcript, p. 1030, l. 8; p. 1042, l. 3-24) Similarly, the investigation of the Nathanael Greene letter ended on October 14, 1985, when the letter was anonymously returned. (Transcript, p. 713, l. 4-9; affidavit supporting first warrant, 12-22-86)

Stale information, indicating that the items sought will be found in the place to be searched, cannot be the basis of a probable cause determination. *United States v. Snow*, 919 F.2d 1458 (10th Cir. 1990). Whether information is stale depends upon the particular facts of a case. *Andresen v. Maryland*, 427 U.S. 463 (1975). For example, the Court in *Andresen* found that a three month delay between the completion of the transactions upon which the warrant was based and the ensuing searches was not unreasonable. *Id.* at 478, n. 9. Under the particular facts in that case, the business records sought by investigators were kept in the ordinary course of business, making it reasonable to expect these would be kept for a three month period of time. *Id.* at 479, n. 9.

In contrast, this case involved allegedly stolen materials. Investigators had no reason to believe that these items would be located at the Petitioner's house since theft generally does not involve an extended holding of the goods. While probable cause was based upon the Nathanael Greene letter and *The Lilies*, these events occurred at least one year before the searches began, and at the time of the searches the materials had been recovered or located.

Though the affidavit describes the investigation into and discovery of the Greene letter and *The Lilies*, it fails utterly to describe any fact or circumstance which would lead one to believe that any of the items contained in the four page "inventory" list would be found in petitioner's home.

C. Officers relied upon a bare bones affidavit to obtain a warrant.

Finally, suppression is appropriate under *Leon* where officers rely only upon a bare bones affidavit to obtain a warrant. Although the affidavit with a four-page list attached does not seem to be bare bones at first glance, examination of the contents indicate that it is the evil that *Leon* intends to prohibit. As mentioned before, the affidavit contained knowing misrepresentations that misled the issuing judge, failed to support the informant's credibility, and based probable cause on stale information. The four-page list of "items missing" from the library was completely inaccurate in that no inventory of the special collections division had been performed; thus, it added no information upon which the issuing judge could base a probable cause determination.

The trial court correctly suppressed all seizures from the first search due to lack of particularity and the lack of probable cause. Under *Leon*, the initial search of the Petitioner's home did not fall within the good faith exception to the exclusionary rule. As such, the taint of the illegal police action was not sufficiently dissipated as to permit admission. Similarly, the taint of the illegal police action of the first search was not sufficiently dissipated from all subsequent searches to permit introduction of that evidence.

II. ALL SUBSEQUENT SEARCHES RELIED SOLELY ON INFORMATION GATHERED FROM THE FIRST ILLEGAL SEARCH; THUS, EVIDENCE OBTAINED IN SUBSEQUENT SEARCHES SHOULD HAVE BEEN EXCLUDED AS FRUIT OF THE POISONOUS TREE.

A recent case explains the fruit of the poisonous tree doctrine:

> The exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint." [cits. omitted] *Murray v. United States*, 487 U.S. 533, 537 (1988).

Murray identifies two separate means to show dissipation of the taint: the independent source doctrine and the inevitable discovery doctrine. *Id.* at 539. *See also Nix v. Williams*, 467 U.S. 431 (1984), *cert. denied* 471 U.S. 1138 (1985). In the present matter, the State of Georgia never claimed that seizures following the initial search were not fruits of the poisonous tree.

A. The illegal search served as the basis for all others.

1. The second search was a direct result of the first.

Testimony indicates that the initial illegal search served as the basis for the second search. A U.G.A.P.D. officer explained the grounds for the second search as follows:

> During the . . . execution of the first search warrant, we noticed two particular maps – the DeBrahm's map and the Eleazer Early map and

> a print of a butterfly. And on our arrival back to the University we discovered that the University Library were [sic.] missing a particular DeBrahm's map and a particular Eleazer Early map. (R., p. 1267, l. 8-15)

On the second search, the items sought were the two maps and the print. Additional testimony indicates that "Upon looking at the items in the house [during the first search] we later determined that there was probable cause to believe that a couple of the items belonged to the University . . . from that information we obtained a second search warrant . . . " (Transcript, p. 1044, l. 1-8) Since officers would not have embarked on this second search but for their discoveries during the initial illegal search, seizures from the second search must be excluded as fruits of the poisonous tree.

2. Remaining searches were directly or indirectly based on the first.

The facts indicate the two remaining warranted searches and one consent search had their basis in the findings of the first search. Testimony indicates that the consent search was undertaken solely because the U.G.A.P.D. had compared a photograph from the first search with information from the Library, and found a map to be seized. (Transcript, p. 1771, l. 13-25)

The remaining two searches were indirectly based upon the first. For example, an officer of the U.G.A.P.D. testified concerning the third warranted search:

> We had already been in Mr. Willingham's house three times . . . We made regular visits, and we knew what was in the house. And based upon that information we had from the library we obtained a third search warrant. (Transcript, p. 1780, l. 17-25)

The fourth search was indirectly based on the first in that the officers relied on previous visits and information from the Library, and "knew some of the items that were there." (Transcript, p. 1783, l. 13-23)

Extensive testimony indicates that certain items seized during the third and fourth searches were identified only by comparing photographs from the first and second searches to the Library's negatives, microfilm, library cards, and employee's recollections. (Transcript, p. 1493, l. 24-25; p. 1494, l. 1-5; p. 1274, l. 7-24; p. 1275, l. 14-24; p. 1281, l. 10-23; p. 1282, l. 7-15; p. 1492, l. 22-23; p. 1494, l. 1-5; p. 1822, l. 5-18)

Since the evidence unflinchingly supports direct or indirect causation flowing from the illegal search to all searches following it, evidence from the remaining searches was admissible only if the taint of illegality was sufficiently dissipated. The State never attempted to dissipate the taint; in fact, it never claimed that seizures following the first search were not fruits of the poisonous tree. Because the State did not rely on the independent source doctrine, inevitable discovery doctrine, or any other showing of the requisite attenuation, evidence seized from subsequent searches should have been suppressed.

B. The State did not and could not show that the illegally gathered evidence came from an independent source.

The independent source doctrine refers to evidence acquired from an untainted source which is identical to the evidence acquired as a result of illegal activity. *Murray v. United States*, 487 U.S. 533 (1988). Since facts illegally obtained are not "sacred and inaccessible," this

doctrine permits admission of items into evidence where knowledge of them is gained through an independent source. *Silverthorne Lumber Co., Inc. v. U.S.*, 251 U.S. 385, 392 (1920).

Murray involved a situation where federal agents entered a warehouse without a warrant and discovered bales of marijuana. They left without disturbing anything, and later returned with a search warrant. In remanding the case to determine whether an independent source of information existed, Justice Scalia gave an example of what is *not* an independent source: An independent source would not have existed if

> The agents' decision to seek the warrant was prompted by what they had seen during the initial [illegal] entry, or if information obtained during that [illegal] entry was presented to the Magistrate and affected his decision to issue the warrant. *Murray*, 487 U.S. at 542.

Under this illustration, an independent source did not exist in the present matter since the decision by the officers of the U.G.A.P.D. to seek additional warrants was "prompted by what they had seen during the initial [illegal] entry, [and the] information obtained during that [illegal] entry was presented to the [Judge] and affected his decision to issue the warrant." *Id.* Since the initial illegal search of the Petitioner's residence, analogous to the illegal entry in *Murray*, formed the sole basis of information to support four additional searches, the prosecution must demonstrate the existence of an independent source to justify the subsequent searches.

The State never proved that an independent source existed, and any attempts to do so would have been unsuccessful. No inventory of the special collections department of the Library had been performed, making it

impossible to ascertain from an untainted source what was missing. (Transcript, p. 2286, l. 11-23)

C. The State made no showing that the evidence would have been inevitably discovered.

The inevitable discovery doctrine is an extrapolation from the independent source doctrine, and provides that "Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray*, 487 U.S. at 539. *See also Nix v. Williams*, 467 U.S. 431 (1984), *cert. denied* 471 U.S. 1138 (1985). *Nix* involved statements concerning location of a victim's body obtained from a suspected murderer in violation of the murderer's rights. At the time that these statements were made, an extensive search for the victim's body was being conducted by a large volunteer group. After the confession, the search was called off. In admitting the confession, the Court relied upon detailed testimony that the body would have inevitably been discovered in the course of the methodical and extensive search. *Nix*, 467 U.S. at 448-450.

To permit introduction of tainted items into evidence, the prosecution must establish by a preponderance of the evidence that the evidence ultimately would have been discovered by lawful means. *Id.* at 444. This showing relies upon "no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 445, n. 5.

Using the *Nix* decision, the Eleventh Circuit formulated the following rule for the propriety of admissibility:

> There must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must

> demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct . . . the Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable. *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied* 471 U.S. 1117 (1985)

The prosecution in this matter made no showing of "demonstrated historical facts" that would support a reasonable probability that the evidence would have been discovered. The Library's discovery of missing items occurred only after the Library compared pictures taken during the first and second searches with its negatives, microfilm, and employees' recollections. Active pursuit of these items had not been initiated prior to the illegal search; instead, the illegal searches served as a means to determine what was missing, not as a way to seize specific evidence of a crime. Without the products of the illegal searches, the Library would never have discovered what was missing.

D. Placing police in the same position as if no misconduct occurred requires exclusion of all evidence.

As with other Fourth Amendment concerns, the purpose of these doctrines is to deter unlawful police conduct, not compensate individual harms. Courts should balance societal interests against the deterrent effect of excluding evidence upon police, and ultimately place police in the same, not a worse, position that they would have been in if no misconduct occurred. *Murray*, 487 U.S. at 537.

In the present matter, placing the law enforcement officials in the same position that they would have been in had no misconduct occurred would entail suppression of all evidence seized in the Petitioner's home. While the police would certainly be better off if all evidence were admitted, the purpose of the independent source doctrine is to put the police in the *same* position had no misconduct occurred. *See Murray*, 487 U.S. at 542. *See also United States v. Silvestri*, 787 F.2d 736, 740 (1st Cir. 1986), *cert. denied* 487 U.S. 1233 (1988) (" . . . when the police are placed in a better position because of their misconduct, the deterrence rationale requires that the advantage be wiped out through suppression.")

If no misconduct had occurred, none of the evidence would have been discovered through an untainted source. Thus, all evidence must be suppressed since the police in this matter did not and could not demonstrate the availability of an untainted source to compensate for the information that was gained during the first illegal search.

III. THE INITIAL TWO SEARCHES WERE GENERAL SEARCHES, AND THE FIVE INTERRELATED AND INVASIVE SEARCHES CONSTITUTED A SINGLE GENERAL SEARCH.

The warrant requirement of the Fourth Amendment assures that necessary searches are as limited as possible; the framers intended to prohibit general warrants permitting a "general exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The prohibited acts – an unlimited search and a rummaging in a person's belongings – occurred during

the one consent and four warranted searches of the Petitioner's home. Specifically, the first search and second search were each general searches, and the series of searches themselves constituted a general search.

A. The first search was a general search.

All seizures resulted from an initial general search. In the affidavit used to procure the second warrant, the U.G.A.P.D. officer stated the following:

> The purpose of the [first] search warrant was to hopefully locate property belonging to the University of Georgia Library . . . Many maps and prints were seen by investigators but were not taken during the search because it was not known if these items were missing from the University of Georgia Library.

From this beginning of rummaging through the Petitioner's home to "hopefully" locate Library property, the officers continued to return in order to seize items that they only recently "discovered" missing. Although Officer Horton described this ongoing, invasive process as giving the Petitioner the "benefit of the doubt," (Mot. to Suppress Hearing, 11-3-87, p. 154, l. 12-21), the framers of the Constitution would undoubtably describe it as using an illegal search to prompt the modern-day equivalent of a witch hunt.

B. The second search was a general search.

1. Police conducted a "general exploratory rummaging" through the contents of the Petitioner's home.

The duration and activities of the second search reflect the much abhorred "general exploratory rummaging in [the Petitioner's] belongings": Although the police

seized two of the three items listed on the warrant in five minutes, the search continued for an additional five hours. The officer in charge of the investigation specifically instructed his subordinates to photograph every item in the Petitioner's home regardless of whether they immediately found the three items listed on the warrant. (Transcript, p. 2285, l. 14-25; p. 2286, l. 1-7) As a result, the officers executing the warrant took approximately eleven rolls of twenty-four exposure film, making photographs of the walls, bookshelves, and contents of drawers. (Transcript, p. 1458, l. 10-24; p. 1763, l. 4-20)

Conducting the search in this manner is similar to the situation presented in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1978). Under the auspices of searching for two "sample films," investigators spent six hours in an adult bookstore conducting a more extensive search based upon what a local justice participating in the search deemed illegal. *Id.* at 326. A unanimous Court described the investigators' activities as "reminiscent of the general warrant . . . against which the Fourth Amendment was intended to protect." *Id.* at 325. In the present matter, investigators spent five hours in the Petitioner's home under the auspices of searching for a single print, when in fact they were conducting a more extensive search by photographing items that they hoped to be University property. Thus, investigators expanded their initial lawful authority into an impermissible general search.

2. Extensively photographing the Petitioner's home constituted an unreasonable seizure.

Several circuit cases indicate that the 257 photographs taken by the U.G.A.P.D. of the Petitioner's home composed an unreasonable seizure.

In *United States v. Espinoza*, 641 F.2d 153 (4th Cir. 1981), *cert. denied* 454 U.S. 841 (1981), federal agents took pictures of a warehouse distributing pornographic materials in order to demonstrate to the Court that the warehouse was a commercial enterprise. Relying on the agent's power to seize visual images under the plain view doctrine, the Court upheld the agent's act as a means of "preserv[ing] the appearance of the interior." *Id.* at 166, 167. *See also United States v. Butler*, 793 F.2d 951, 953-954 (8th Cir. 1986)(The Court upheld seizures of photographs of the defendant's residence for their use as "visual depiction[s] of the place where grenade components were found.")

The 257 photographs taken of the Petitioner's walls, bookshelves, and drawers went far beyond visual depictions to "preserve the appearance of the interior." The sole purpose of the photographs was to permit Library employees to compare the images with their recollections, negatives, and microfilm. Since the Library used the photographs to discover "missing" items, their use to show officers the location of items came only peripherally.

The present situation is analogous to *United States v. Johnson*, 452 F.2d 1363 (D.C. Cir. 1971), *cert. denied* 415 U.S. 923 (1974), where the Court held that photographs taken of a detainee prior to police having probable cause for his arrest possibly violated the Fourth Amendment where the photographs were used to secure probable cause for arrest. Similarly, a Fourth Amendment violation occurred in the present matter since police used the photographs to manufacture evidence against the Petitioner to support a determination of probable cause for future searches.

The same conclusion of unreasonable seizure results upon consideration of *Segura v. United States*, 468 U.S. 796

(1984). The *Segura* petitioners argued that a seizure occurred when agents entered and remained on their premises to secure the contents while the petitioners were in police custody. *Id.* at 805. While not deciding specifically whether a seizure had occurred, the Court assumed a seizure and found that it was not unreasonable under the totality of the circumstances. *Id.* at 806. Any seizure that occurred was reasonable because no information contained in the subsequent warrant derived from the initial entry onto the petitioners' premises. *Id.* at 810.

The present matter demands a different result since the seizure that occurred was unreasonable under the totality of the circumstances. The possible seizure that occurred in *Segura* secured the premises from being emptied by allies of the petitioners. In contrast, the 257 photographs taken by the U.G.A.P.D. seized incriminating evidence to be used against the Petitioner. The *Segura* seizure did not afford information to be used on a subsequent search warrant, while the seizure in the present matter was the sole source of information for the third and fourth warrants and the consent search. In light of these differences, the photographs taken of the Petitioner's home constituted an unreasonable seizure.

3. The 257 photographs taken of the Petitioner's home by the police during the second search are not protected under the plain view doctrine.

Alternatively, extensively photographing the Petitioner's home is akin to seizing evidence in plain view of the law enforcement officers: Incriminating evidence is captured without the formality of a warrant. The photographs in question constituted incriminating evidence

since their sole use was to determine what the Library was missing from its special collections division. In the words of the supervising officer, the purpose of the photographs was "[t]o see if there was any possibility that what he had might belong to the University of Georgia." (Transcript, p. 1280, l. 21-24) Extensive testimony indicates that the photographs served as a means for the Library to identify property by comparing the photographs with negatives, microfilm, library cards, and employees' recollections. (Transcript, p. 1274, l. 7-24; p. 1275, l. 14-24; p. 1281, l. 10-23; p. 1282, l. 7-15; p. 1492, l. 22-23; p. 1493, l. 24-25; p. 1494, l. 1-5; p. 1822, l. 5-18.)

The plain view doctrine permits unwarranted seizures of incriminating evidence under certain circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). *See also Horton v. California*, ___ U.S. ___, 110 S. Ct. 2301 (1990)(removing the inadvertence requirement for plain view seizures). However, it does not cover the activities of the U.G.A.P.D. in this instance since this doctrine "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge*, 403 U.S. at 465-466. Spending five hours to photograph the entire contents of the Petitioner's home under the guise that one item remained to be seized constitutes an exploratory search not under the protection of the plain view doctrine.

4. Photographs taken during the second search constituted an unreasonable seizure since they were not particularly described in the affidavit supporting the warrant.

The Fourth Amendment requires a warrant to "particularly describ[e] the place to be searched, and the

persons or things to be seized." U.S. Const. amend. IV. The purpose of this requirement is as follows:

> By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

In the present matter, officers of the U.G.A.P.D. completely abandoned the particularity requirement in that they never informed the judge issuing the second warrant of their intent to photograph the Petitioner's home. (Mot. to Suppress Hearing, 11-20-87, p. 141, l. 15-19) In failing to do so, the officers were solely left to their discretion as to how to conduct the search and as to what to seize, in contravention of constitutional law. *See, e.g., Marron v. United States*, 275 U.S. 192 (1927).

C. The series of searches constituted a general search.

The frequency and interdependence of the five searches indicate that the searches were not as limited as possible. The first search warrant was executed on December 22, 1986, the second was executed on February 2, 1987, the consent search was performed on February 3, 1987, the third search warrant was executed on February 17, 1987, and the final search was held on March 30, 1987. During this three month span, police searched the Petitioner's home five times. In fact, Officer Jones of the U.G.A.P.D. cavalierly testified as to his familiarity with the Petitioner's residence: "We made regular visits, and we knew what was in the house." (Transcript, p. 1780, l. 17-25)

The close relationship between the five searches demonstrates that they constitute a single general search. The officers did not make out a case against the Petitioner and then embark on a search and seizure to discover specific evidence of crime; instead, the officers embarked on the five searches and seizures to discover any item upon which a case could then be made against Petitioner.

IV. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Petition for A Writ of Certiorari be granted.

DATED this ___ day of ___, 1991.

Respectfully submitted,

ERNEST DE PASCALE, JR.
FORTSON, BENTLEY & GRIFFIN
P.O. Box 1744
Athens, Georgia 30613
(404) 548-1151

Counsel of Record for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF CLARKE COUNTY, GEORGIA

FINAL DISPOSITION

State of Georgia

vs

Robert M. Willingham

CRIMINAL ACTION NO. SU-87-CR-0992

OFFENSE(S) CT. II-XII & XIV Theft by Conversion

July TERM, 1988

[ ] PLEA:

[ ] NEGOTIATED

[ ] GUILTY ON COUNTS(S) ___

[ ] NOLO CONTENDERE ON COUNTS(S) ___

[ ] TO LESSER INCLUDED OFFENSE(S) ___

ON COUNT(S) ___

[X] JURY

[ ] NON-JURY

[X] VERDICT:

[X] GUILTY ON COUNT(S) I-XII & XIV

[ ] NOT GUILTY ON COUNT(S) ___

[ ] GUILTY OF INCLUDED OFFENSE(S) OF ___

ON COUNT(S) ___

[ ] OTHER DISPOSITION

[ ] NOLLE PROSEQUI ORDER ON COUNT(S)___

[ ] DEAD DOCKET ORDER ON COUNT(S) ___

(SEE SEPARATE ORDER)

[X] DEFENDANT WAS ADVISED OF HIS RIGHT TO HAVE THIS SENTENCE REVIEWED BY THE SUPERIOR COURTS SENTENCE REVIEW PANEL.

[X] FELONY SENTENCE
[ ] MISDEMEANOR SENTENCE

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that: The said defendant is hereby sentenced to confinement for a period of 15 years in the State Penal System or such other institution as the Commissioner of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court:

[X] 1) THAT the above sentence may be served on probation

[ ] 2) That the first ___ years of this sentence be served in confinement, and that following the Defendant's release from confinement the remainder of the sentence herein imposed be served by the Defendant on probation; PROVIDED, that the said Defendant complies with the following general and special conditions herein imposed by the Court as a part of this sentence.

The defendant, having been granted the privilege of serving all or part the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

[ ] 1) Do not violate the criminal laws of any governmental unit.

[ ] 2) Avoid injurious and vicious habits – especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

[ ] 3) Avoid persons or places of disreputable or harmful character.

[ ] 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him at home or elsewhere.

[ ] 5) Work faithfully at suitable employment or pursue his education full time and support his legal dependents in so far as is possible.

[ ] 6) Do not change his present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

[ ] 7) Be truthful with the Probation Officer.

[ ] OTHER CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of ___ plus $50 or 10%, whichever is less pursuant to O.C.G.A. § 15-21-70, and pay restitution in the amount of ___.

It is ordered that this sentence be served consecutive to the sentence imposed in Count I of this indictment.

It is ordered that he pay [Partial *JB*] restitution through the probation office to the Regents of the University System of Georgia for the use of the University of Georgia Library in the amount of $45,000.00 at $3,000.00 per year beginning on the last day of the first year of probation and continuing annually thereafter for an agregate amount of $45,000.00.

The duration of this probation sentence is to enable the defendant to earn the sums necessary to pay the restitution.

IT IS FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Ernest DePascale Attorney at Law Clarke County, by (Employment).

If all or any part of this sentence is probated I certify that I completely understand the meaning of the order of probation and the conditions of probation.

_____
Signature of Probationer

_____
Date

So ordered this 8th day of September 19 88

/s/ James Barrow
Judge Superior Courts,
Western Judicial Circuit

Filed in Office, this 12th day of Sept., 1988 Sherry Wages
Deputy Clerk

IN THE SUPERIOR COURT OF CLARKE COUNTY, GEORGIA

FINAL DISPOSITION

State of Georgia

vs

Robert M. Willingham

CRIMINAL ACTION NO. SU-87-CR-0992

OFFENSE(S)
CT. I – Theft by Conversion

July TERM, 1988

[ ] PLEA:

[ ] NEGOTIATED

[ ] GUILTY ON COUNT(S) ___

[ ] NOLO CONTENDERE ON COUNTS(S) ___

[ ] TO LESSER INCLUDED OFFENSE(S) ___

ON COUNT(S) ___

[X] JURY

[ ] NON-JURY

[X] VERDICT:

[X] GUILTY ON COUNT(S) I-XII & XIV

[ ] NOT GUILTY ON COUNT(S) ___

[ ] GUILTY OF INCLUDED OFFENSE(S) OF ___

ON COUNT(S) ___

[ ] OTHER DISPOSITION

[ ] NOLLE PROSEQUI ORDER ON COUNT(S)___

[ ] DEAD DOCKET ORDER ON COUNT(S) ___

(SEE SEPARATE ORDER)

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[ ] 1) THAT the above sentence may be served on probation

[ ] 2) That the first ___ years of this sentence be served in confinement, and that following the Defendant's release from confinement the remainder of the sentence herein imposed be served by the Defendant on probation; PROVIDED, that the said Defendant complies with the following general and special conditions herein imposed by the Court as a part of this sentence.

---

* * *

The defendant was represented by the Honorable Ernest DePascale Attorney at Law Clarke County, by (Employment).

If all or any part of this sentence is probated I certify that I completely understand the meaning of the order of probation and the conditions of probation.

_____
Signature of Probationer

_____
Date

So ordered this 8th day of September 19 88

/s/ James Barrow
Judge Superior Courts,
Western Judicial Circuit

Filed in Office, this 12th day of Sept., 1988 Sherry Wages
Deputy Clerk

WHOLE COURT

DEC 5 1990

In the Court of Appeals of Georgia

A90A1004. WILLINGHAM v. THE STATE. S-47C to Ca

CARLEY, Chief Judge.

Appellant was tried before a jury and found guilty of thirteen counts of theft by conversion of documents from the University of Georgia Library. He appeals from the denial of his motion for new trial.

1. The denial of appellant's motion to suppress is enumerated as error.

Appellant's reliance upon *Hill v. State*, 193 Ga. App. 280 (387 SE2d 582) (1989) is misplaced. Insofar as *Hill* might arguably be relevant to the facts of the instant case, it has been overruled. *State v. Harber*, ___ Ga. App. ___ (Case Number A90A1077, decided December 5, 1990). Appellant's remaining contentions have been considered and are found to be without merit. The trial court was authorized to find that all searches were conducted in full compliance with applicable constitutional and statutory requirements.

2. We find no error in the trial court's failure to sustain appellant's challenge for cause which was directed towards prospective jurors who were employees of the University of Georgia, but who were not otherwise employed in, or assigned to, the University of Georgia Library. See *Jordan v. State*, 247 Ga. 328, 338 (6) (276 SE2d 224) (1981); *Culbertson v. State*, 193 Ga. App. 9, 10 (2) (386 SE2d 894) (1989); *Hickox v. State*, 138 Ga. App. 882 (1) (227

SE2d 829) (1976). See also *United States v. Boyd*, 446 F2d 1267, 1275 (10) (5th Cir.) (1971). This is *not* a case wherein the prospective jurors were employees of appellant or any other *party* to the case. Compare *Kesler v. State*, 249 Ga. 462, 470 (6) (291 SE2d 497) (1982); *Daniel v. Bi-Lo, Inc.*, 178 Ga. App. 849, 850 (1) (344 SE2d 707) (1986). Only appellant and the State were parties in this *criminal* case. While *kinship* to the victim may automatically disqualify prospective jurors in a criminal case pursuant to OCGA § 15-12-163 (b) (4), mere *employment* by the University of Georgia when the actual victim was the University of Georgia Library is *not* a *per se* disqualification under the above cited holdings.

3. It was not error to admit, over appellant's objections, numerous exhibits which were adequately shown to be business records of the University of Georgia Library. See *Gray v. Cousins Mort. & Equity Investments*, 150 Ga. App. 296 (1) (257 SE2d 365) (1979); *Lewis v. United Calif. Bank*, 143 Ga. App. 126 (1) (237 SE2d 645) (1977) aff'd 240 Ga. 823 (242 SE2d 581) (1978); *Cotton v. John W. Eshelman & Sons, Inc.*, 137 Ga. App. 360, 361 (1) (223 SE2d 757) (1976).

4. The evidence, when construed most favorably for the State, was sufficient to authorize a rational trier of fact to find proof of appellant's guilt beyond a reasonable doubt and it was not, therefore, error to deny his motion for a directed verdict of acquittal. See *Adcock v. State*, 170 Ga. App. 753 (1) (318 SE2d 492) (1984) aff'd 253 Ga. 328 (322 SE2d 61) (1984).

5. Having considered appellant's fatal variance argument, we find that it has no merit. The evidence,

when construed most favorably for the State, would authorize a finding that within the applicable statute of limitations, appellant committed the crimes that the multi-count indictment alleged he had committed. See *Decker v. State*, 139 Ga. App. 707, 709 (5) (229 SE2d 520) (1979).

Judgments affirmed. Deen, P. J., McMurray, P. J., Birdsong and Cooper, JJ., concur. Banke, P. J., concurs specially. Sognier and Pope, JJ., dissent. Beasley, J., concurs in Divisions 1, 3, 4, and 5, but dissents as to Division 2, and as to the judgment.

A90A1004. WILLINGHAM v. THE STATE. S-47.

BANKE, Presiding Judge, concurring specially.

Pursuant to OCGA § 20-3-72, university police officers "have the power to make arrests for offenses committed upon any property under the jurisdiction of the board of regents. . . . " As the officers in the present case were investigating thefts of university property which had occurred upon university property, it follows that they were acting entirely within the scope of their law enforcement jurisdiction under § 20-3-72. For this reason, I agree that the trial court acted properly in denying the appellant's motion to suppress.

A90A1004. WILLINGHAM v. THE STATE. S-47 to Ca

SOGNIER, Judge, dissenting.

I respectfully dissent.

1. Since this case will be decided en banc on the same day that *State v. Harber*, ___ Ga. App. ___ (Case No. A90A1077, decided December 5, 1990) is issued, I believe the parties in the instant case are entitled to the same thorough treatment of the search and seizure issue as is given in *Harber*. Hence, for this case I again state my view that *Hill v. State*, 193 Ga. App. 280 (387 SE2d 582) (1989) was correctly decided and controls the search and seizure issue raised by appellant. Since the searches at issue were conducted prior to the effective date of the 1990 amendments to OCGA §§ 17-5-20, 17-5-21 (Ga. Laws 1990, p. 1980, §§ 1-3), the only authority directly addressing the power of university system police to obtain and execute search warrants beyond the confines of a campus is our decision in *Hill*. In overruling the denial of the defendants' motion to suppress, this court held that because OCGA § 20-3-72 authorized university system police to make arrests "for offenses committed upon any property under the jurisdiction of the board of regents and for offenses committed upon any public or private property within 500 yards of any property under the jurisdiction of the board," search warrants likewise " 'must be confined to the territorial limits of the campus.' [Cit.]" Id. at 281.

It is uncontroverted that the searches in the case at bar were not conducted within these territorial limits. Although the thefts did occur "on property under the jurisdiction of the board of regents," we concluded in *Hill*

that the statutory enactments governing university system police do not contemplate the exercise of their law enforcement powers beyond the territorial boundaries defined in OCGA § 20-3-72. I note that the university police officers who conducted the searches at issue were certified peace officers, and OCGA § 17-5-24 has been construed to authorize the execution of a search warrant by a certified peace officer outside his arrest jurisdiction. *Bruce v. State*, 183 Ga. App. 653 (359 SE2d 736) (1987). Nonetheless, a certified peace officer's authority arises only from express statutory authorization or by virtue of public employment or service. OCGA § 35-8-2(8)(A). Unlike university system police, other law enforcement officers authorized under Georgia law are given a number of specified duties and powers in addition to the power to arrest. See OCGA § 35-2-33 (state patrol); OCGA § 36-8-5 (county police); OCGA § 35-3-8 (GBI agents); OCGA § 35-3-9 (GBI narcotics agents). In contrast, OCGA § 20-3-72, which was enacted in 1966 (Ga. Laws 1966, p. 370), and is codified in the postsecondary education chapter of Title 20, is the only statute that specifically grants any law enforcement power to university system police. Accordingly, any authority of such officers beyond that specified in OCGA § 20-3-72 must arise from the general power of the board of regents to create and regulate universities. See Ga. Const. art. VIII, sec. IV, para. I; OCGA § 20-3-20 et seq. There is no other statute in Title 20, Chapter 3, Article 2 or elsewhere in our Code which grants to the board of regents any police powers beyond the territorial limits of the university system. Since university system police have no express statutory authority beyond university system property, and their

employer, the board of regents, does not have the authority to grant such powers, we cannot construe the peace officer certification provisions to authorize university system police to exercise law enforcement powers beyond the territorial limits established by OCGA § 20-3-72.

This conclusion is consistent with the 1990 amendments to OCGA §§ 17-5-20 and 17-5-21, which were enacted after our decision in *Hill*, supra. OCGA § 17-5-20 was rewritten to provide in paragraph (a) that "[a] search warrant may be issued only upon the application of an officer of this state or its political subdivisions charged with the duty of enforcing the criminal laws or a currently certified peace officer engaged in the course of official duty, whether said officer is employed by a law enforcement unit of: (1) [t]he state or a political subdivision of the state; or (2) [a] university, college, or school." The 1990 revision to OCGA § 17-5-21 included the addition of a new paragraph (d) providing that when a campus police officer executes a search warrant by campus police "beyond the arrest jurisdiction of a campus policeman pursuant to Code Section 20-3-72, the execution of such search warrant shall be made jointly by the certified peace officer employed by a university . . . and a certified peace officer of a law enforcement unit of the political subdivision wherein the search will be conducted." These revisions, although including campus police in the search and seizure laws for the first time, indicate that the General Assembly retained an express distinction between certified peace officers employed by a college or university and other certified peace officers, and did not elect to extend to campus

police authority equal to that possessed by law enforcement officers of the State or its political subdivisions.

This court has long recognized that " ' "[p]roceedings for the issuance of search warrants are to be strictly construed, and every constitutional and statutory requirement must be fully met, including all formalities required by statute, before a valid search warrant may issue. Moreover, a statute prescribing the method of issuing search warrants must be read and construed in the light of, and conform in all essential respects to, the provisions of the constitution granting immunity from unreasonable searches and seizures." [Cit.] It should be borne in mind that here we are dealing with a valuable guaranty, a part of the Bill of Rights, the subject matter of the Fourth Amendment to our national Constitution. We, who have this right, must carefully guard it against infringement.' " *Pruitt v. State*, 123 Ga. App. 659, 664 (182 SE2d 142) (1971). As a result, I find that the searches on February 2 and 17 and March 30 were not authorized under the law applicable at the time, and consequently find the trial court erred by denying appellant's motion to suppress the evidence seized. See *Hill*, supra at 281.

I further agree with appellant that the one consensual search conducted on February 3 was invalid because the officers sought and gained entry to appellant's home for the express purpose of obtaining an item they had seen during prior searches, and thus, despite appellant's apparent consent, the evidence seized in the second search was tainted as fruit of the poisonous tree of the prior illegal searches under the standard set fourth in *Wong Sun v. United States*, 371 U.S. 471, 488 (83 SC 407, 9 LE2d 441, 445) (1963). Even assuming, without deciding,

that appellant's consent to search was voluntary and not coerced, evidence seized during the search on February 3 could not be used against appellant at trial unless the search was sufficiently attenuated from the prior illegal searches. *United States v. Robinson*, 625 F2d 1211, 1219 (5th Cir. 1980); *Brown v. State*, 188 Ga. App. 184, 187 (372 SE2d 514) (1988). The factors to be considered are the temporal proximity of the illegal activity and the consent, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Robinson*, supra. Here, there were no intervening circumstances or breaks in the chain of illegality, and Officer Jones testified the university police returned to appellant's home for the express purpose of retrieving a map they had seen on prior entries. Nor was there a significant lapse of time between this search and the one conducted a day earlier. Accordingly, I would reverse the denial of appellant's motions to suppress.

2. I also agree with appellant that the trial court erred by not excusing for cause all prospective jurors who were employed by the University of Georgia. Our Supreme Court has adopted in criminal cases the rule initially applied in civil cases of disqualifying for cause potential jurors who are employed by the same entity as the defendant when the defendant has the power to discharge the employees. *Kesler v. State*, 249 Ga. 462, 470-471 (6) (291 SE2d 497) (1982). I believe we also should adopt for criminal cases the rule that a prospective juror should be disqualified for cause " 'when there exists any business relation between himself and one of the parties which may tend to influence the verdict.' [Cit.]" *Daniel v. Bi-Lo, Inc.*, 178 Ga. App. 849, 850 (344 SE2d 707) (1986).

" 'The wisdom of such [a] rule is substantiated when one considers the plight of any employee during voir dire. "The single purpose for voir dire is the ascertainment on the merits with objectivity and freedom from bias and prior inclination." (Cit.) An individual subpoenaed to jury service in the performance of his public duty should not be called upon to answer affirmatively or negatively with its resultant impact either way upon him personally the question: "Would your employment prevent you from fulfillment of your sworn duty as a juror to act fairly and impartially and without bias as between the parties in this case?" In order to [e]nsure that each party obtains a panel of impartial jurors it is essential to rule that regardless of any presumption employees should be held incompetent to service as a juror in a case in which the employer is a party.' [Cit.] This rule is applicable to parties who, although not named in the suit, have a financial or other interest in the outcome of the litigation to be tried. [Cits.] . . . ' "An employee . . . may be, in rare instances, an impartial juror in passing upon the rights of his employers. It is possible for a judge or juror to be so absolutely fair that he could try his own cause. But there must be a rule upon the subject, and the only rule that can be adopted with safety is one which recognizes the interest to which humanity is generally susceptible and not a rule based upon rare exceptions." ' [Cit.]" Id. at 850-851. Surely the Sixth Amendment entitles a criminal defendant to the same protection. Where, as here, seven of the prospective jurors were employed by the victim of the theft and were dependent upon that employer for their income, they should have been disqualified for cause, and the failure to do so constitutes reversible error.

See Id. at 852 (1); see also *Crumpton v. Kelly*, 185 Ga. App. 245-246 (1) (363 SE2d 799) (1987).

I am authorized to state that Judge Pope concurs in the dissent and Judge Beasley concurs in Division 2 only of the dissent.

Court of Appeals
of the State of Georgia

ATLANTA,

DECEMBER 20, 1990

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Case No. A90A1004

ROBERT M. WILLINGHAM V. THE STATE

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 20 1990

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
Clerk.

Case No. S91C0533

SUPREME COURT OF GEORGIA

ATLANTA February 1, 1991

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Application for certiorari to review the Court of Appeals' decision in:

ROBERT M. WILLINGHAM

V.

THE STATE

having been filed in this Court and motion for extension of appeal bond having been filed, it is hereby ordered that said motion be granted.

Pursuant to OGGA §17-6-1(d) as amended petitioner's appeal bond is extended.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Hogg, Deputy Clerk.

S91C0533

SUPREME COURT OF GEORGIA

ATLANTA May 10, 1991

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROBERT M. WILLINGHAM v. THE STATE

It appearing that the writ of certiorari was improvidently granted, it is hereby vacated. All the Justices concur, except Smith, P.J., and Benham, J., who dissent.

Court of Appeals No. A90A1004

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Hogg, Deputy Clerk.